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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 442nd MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 11 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

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Article 2 (continued)

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The meeting was called to order at 2.10 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 2 (continued)

1. The CHAIRMAN invited the Commission to consider article 2(f), which defined the term "bank".

2. Mr. ADEDIRAN (Nigeria) said that, in view of the fact that in some jurisdictions individuals were permitted to act as banks, subparagraph (f) should refer to "any person who accepts payment instructions".

3. Mr. IWAHARA (Japan) said that the definition proposed by the United States in its written comments (A/CN.9/347/Add.1, p. 12) would be unduly restrictive; it would, for example, exclude certain bank branches in Japan which executed payment orders without demanding deposits. It would also lead to confusion as to which entities were covered by the Model Law: would it, for example, cover post offices engaged in credit transfers?

4. Ms. KOSKELO (Observer for Finland) said that post offices should be included in the sphere of application of the Model Law if they provided a credit transfer service. She wondered if that would be the result if banks were defined as depositary institutions. In its written comments on subparagraph (f) of article 2 (A/CN.9/347, p. 16) her Government had pointed out that the second sentence of the subparagraph seemed superfluous in view of the definition of the term "execution" in subparagraph (1).

5. Mr. SCHNEIDER (Germany) agreed with the observation made by the representative of Japan.

6. Mr. LIM (Singapore) said that he supported the Canadian and United States written proposals, which made provision for licensing by a country's central banking authorities. As to the comment by the representative of Japan concerning post offices, a possible formulation would be to state that a bank was an institution licensed by the central banking authorities, including an institution authorized by those authorities to carry out international credit transfers.

7. Mr. BHALA (United States of America) said that his Government's proposed definition aimed at narrowing the scope of the term "bank" so as to exclude securities firms such as, for example, Western Union. The textual suggestion made by the representative of Singapore was well-founded and might usefully be adopted.

8. Mr. HUANG Yangxin (China) said that most countries had regulatory bodies for the banking sector and that the existing definition took adequate account of that.

9. Mr. AL-NASSER (Observer for Saudi Arabia) said that the existing definition could be made more comprehensive by specifying in the first sentence that a bank was an entity licensed to accept and give effect to payment orders.

10. Mr. POTYKA (Observer for Austria) said that his delegation approved the second sentence of subparagraph (f).

11. Mr. SCHNEIDER (Germany) said that he understood that the modernization of the banking system at present under way in the United States would involve entities which were holding concerns with multiple subsidiaries. He wondered how the Model Law would affect those subsidiaries if payment orders were transmitted to them.

12. Mr. BURMAN (United States of America) said that federal legislation to regulate securities firms was pending and would cover the field of credit transfers, but that the question of such firms and their regulation had not been tackled in the Working Group. As far as the definition in article 2(f) was concerned, his delegation felt that the more narrowly a bank was defined, the more likely it was that the Model Law would gain general acceptance.

13. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said that in his view a broader approach would be preferable. He therefore suggested that the definition should state that a bank meant any entity which engaged in making payment orders.

14. Mr. VASSEUR (Banking Federation of the European Community) said that the Federation had concluded that all entities engaged in credit transfer operations, including post offices, brokers, securities firms and stock exchanges should fall within the purview of the Model Law in order to ensure that they could compete on a footing of equality. It could therefore accept the existing definition but could also go along with an additional sentence stating that an entity was not a bank if it was confined to transmitting payment orders.

15. Mr. DE BOER (Netherlands) said that a reference to regulatory bodies would be out of place in the Model Law, whose provisions fell solely within the scope of private law.

16. Mr. BHALA (United States of America), responding to the comment made by the representative of Japan, said that foreign banks in the United States would be covered by sub-subparagraph (ii) of the definition proposed by the United States, and also by sub-subparagraphs (iii) and (iv), because they received deposits and had the power to accept demand deposits in their home countries.

17. In regard to the point raised by the representative of the Netherlands, he said that the question of supervision of the entities covered by the Model Law could not be disregarded. The distinction between public law and private law would have to give way as the discussion of the articles of the Model Law proceeded.

18. Mr. BURMAN (United States of America) expressed concern that a move was being made to bring a large number of entities within the scope of the Model Law regardless of their supervisory and regulatory arrangements and their functioning.

19. Mr. BHALA (United States of America) said that, if the Commission so wished, his delegation would be willing to modify sub-subparagraphs (ii), (iii) and (iv) of its proposed definition to cover post office services.

20. Mr. RENGER (Germany) opposed the proposal by Saudi Arabia. To include a licensing requirement in the Model Law would introduce public law into a matter of private international contract law. He was therefore unable to accept the arguments put forward by the United States delegation either.

21. Mr. GREGORY (United Kingdom) did not think it would be helpful for the Model Law to refer to a licensed institution, for the reason given by the representative of Germany. Although the Model Law did not require credit transfer institutions to be supervised, it was nevertheless being drafted to deal with transactions to which supervisory rules were crucial. The United Kingdom favoured the first sentence of the existing definition of the term "bank". The impact of the supervisory regime on other institutions, particularly in the securities business, needed to be considered further. It had not been demonstrated that the Model Law should not be applicable to all those who undertook credit transfer operations as an ordinary part of their business.

22. Mr. LE GUEN (France) said that limiting the meaning of the term "bank" to institutions that were licensed and subject to regulatory authority was unacceptable to France, a country in which the post office carried out certain financial transactions without being licensed and the central bank operated on behalf of the Government on an unlicensed basis. Furthermore, limiting the meaning of the term to institutions that received deposits would conflict with French banking law, under which a bank was either an institution that received deposits or one that made credit available. In Europe the term "credit institution" meant an institution that was not limited to receiving deposits.

23. Mr. AL-NASSER (Observer for Saudi Arabia) said that he had proposed the use of the term "licensed" because some States exercised control over credit transfers by providing that an institution that was not licensed to execute payment orders could not do so. He understood that entities such as the Society for Worldwide Interbank Financial Telecommunications (SWIFT) that effected banking operations were authorized to do so by a bank.

24. Mr. LOJENDIO OSBORNE (Spain) approved the first sentence of article 2(f) as it stood. It was not reasonable for a credit transfer to fall outside the scope of the Model Law because of national licensing practices. If a non-authorized entity engaged in transactions for which a licence was required, it would be liable to administrative sanctions in the country concerned. The Model Law would cover the consequences of events such as bankruptcy; for example, if a bank selected as an intermediary an entity that did not offer sufficient guarantees of solvency, article 16(8) would apply.

25. Mr. LOPEZ ROCA (Observer for Colombia) said that the term "bank" normally referred to an institution involved in an activity restricted to entities holding a government licence, whereas the definition in article 2(f) sought to extend the term to entities executing payment orders which were not required to be licensed. A middle path would be to use in article 2(f) a term applicable to any person executing payment orders, whether licensed or not. If the Commission decided to employ the term "bank" notwithstanding what he had said, it would have to be understood in a broad sense, but the Commission might usefully consider replacing it by a different expression.

26. Mr. ADEDIRAN (Nigeria) said the meaning of the term "bank" should not be looked at in terms of traditional banks but rather in terms of the transactions undertaken. Any entity that accepted an international payment transfer should be considered a bank.

27. Mr. BURMAN (United States of America) said that his delegation was inclined to support the Colombian suggestion. If the Commission decided that the definition should include entities other than traditional banks, it would be advisable to avoid the use of the word "bank". That term had a specific meaning in many people's minds and it would be better to clarify the situation by using a term such as "credit transfer institution", which the Secretariat had suggested (A/CN.9/346, p. 18, para. 40). Its merit was that, whether broadly or narrowly defined, it had a recognized meaning.

28. Mr. BERGSTEN (Secretary of the Commission) said that there was no disagreement with the United States view that the term "bank" as presently defined raised problems. The fact remained that no suitable alternative had yet been found. The Secretariat had looked at various possible replacements and had found that each of them, like the term "bank", had a specific meaning which was not exactly what the definition was intended to convey. The objection to the term "credit transfer institution", which did describe accurately what was intended, was its awkwardness. A happy solution would be a term which produced a neat acronym such as SWIFT.

29. Mr. LE GUEN (France) suggested the term "credit transfer entity". The word "entity" could then replace the word "bank" in the terms "receiving bank", "intermediary bank", and so on.

30. The CHAIRMAN said it was his feeling that the majority approved the first sentence of article 2(f) as it stood, subject to a decision as to whether the word "bank" or another term was to be used, and that it believed that a reference to licensing would be inappropriate.

31. He invited the Commission to move on to the second sentence of subparagraph (f) of article 2. It had been suggested that the sentence might be deleted, for two reasons. The first was that it stated the obvious and added nothing to the meaning. The second was that the word "merely" carried unintended negative implications: where business other than transmission was transacted, it was thought that doubt might arise as to whether or not it was covered by the Model Law.

32. Mr. LOJENDIO OSBORNE (Spain) favoured the deletion of the sentence. The place in which to deal with what was meant by an executing entity was in the definition of the term "execution", which needed to be expanded to cover execution by the beneficiary's bank.

33. Mr. BHALA (United States of America) said that his delegation believed the second sentence to be important and certainly not unnecessary. He took the view that it added substance and clarity to the term "bank" or "entity" or whatever expression the Commission decided should be defined in article 2(f). It ensured the exclusion of mere money transmitters and precluded at least in some cases a debate as to whether or not a data manager such as SWIFT was engaged in the execution of payment orders.

34. Mr. BURMAN (United States of America) said that the negative implications ascribed to the second sentence were not apparent to his delegation, which had been advised that opinions varied as to whether transmitters of messages, such as SWIFT, were to be considered transmitters of funds. The point was not clear, and clarity as to what the Model Law covered was essential. If the sentence had negative implications they should be discussed, and a way found of dealing with them which did not result in the application of the Model Law to institutions which it was not wished to cover. If the Commission completed its work and immediately afterwards people began to ask whether SWIFT or other data managers, or INTELSAT, or a given telecommunications network was covered, the law should be clear on the point.

35. Mr. BERGSTEN (Secretary of the Commission) observed that a comparison of SWIFT with the Clearing House Interbank Payments System (CHIPS) was instructive. If SWIFT was considered a value-added network, it could be regarded as doing more than just transmit; in connection with a given payment it did not do much more than transmit a message, but it did nevertheless add a transaction number and a sequential number. That, however, did not affect the payment transaction itself. CHIPS, on the other hand, clearly did much more than transmit in that it added and netted, thus affecting the payment process itself in a way that SWIFT did not. The biggest problem was caused by the use of the word "merely", but the solution was not simply to delete that word, because a bank itself might transmit. Some banks had their own satellites, transponders and telecommunications networks as part of their banking operation, so that great care must be taken not to end up with a sentence which suggested that someone who transmitted money messages was not a bank, as that would exclude some transmitters that clearly were banks.

36. Mr. BURMAN (United States of America) thanked the Secretary for his very useful explanation. At some stage he hoped to offer some drafting suggestions to meet the problem. As to whether SWIFT was or was not engaged in the transfer of funds, both positions had their proponents; he would agree that CHIPS had a more compelling case to be included in that category, but even as to SWIFT the point needed to be dealt with.

37. Mr. AL-NASSER (Observer for Saudi Arabia) remarked that it would be premature to delete the second sentence of subparagraph (f) while the first sentence remained undecided. He would prefer that part of the definition to be settled before a decision was taken on the second sentence.

38. The CHAIRMAN suggested that the discussion might proceed on the assumption that the term being defined was "bank" unless and until a better term had been found.

39. Mr. LIM (Singapore) said that, as the representative of Spain had pointed out, the notion of execution was defined in article 2(1). Perhaps the point made in the second sentence of subparagraph (f) could be taken care of instead by adding at the end of subparagraph (1) the words "but excludes the mere transmission of a payment order".

40. Mr. LOJENDIO OSBORNE (Spain) thought it was clear from the definition of the term "execution" that it did not cover the mere transmission of a payment order.

41. The CHAIRMAN said that, if there was no opposition to the idea underlying the suggestion made by the representative of Singapore, the Secretariat might be asked to work out some formula to ensure that institutions merely transmitting payment orders were excluded from the operation of the Model Law, for consideration at a later meeting.

42. He suggested that the Commission might now deal with subparagraph (d).

43. Mr. BHALA (United States of America) said that, in view of the discussion just held on the definition of the term "bank", his delegation did not need to make its intended point regarding subparagraph (d).

44. The CHAIRMAN said that, if there was no objection, he would take it that the Commission was ready to leave subparagraph (d) as it stood.

45. He invited the Commission to consider the question whether there should be a general provision to the effect that branches of banks should be regarded as separate banks for the purposes of the Model Law.

46. Mr. BERGSTEN (Secretary of the Commission) said that, as pointed out in the Secretariat's comments (A/CN.9/346, p. 18, para. 41), it had been suggested at an earlier stage in the drafting of the Model Law that the definition of the term "bank" should provide that "for the purposes of these Rules a branch of a bank is considered to be a separate institution". However, the Working Group had decided that it should first consider in relation to each substantive article whether branches should be treated as banks. Now might be an appropriate time to consider whether branches and separate offices of a bank were always to be regarded as separate banks for the purposes of the Model Law, and if so to consider covering the point by means of a general provision in the definitions. As mentioned in paragraph 43 of document A/CN.9/346, there might be provisions of the draft other than those containing references to branches in relation to which the status of branches should be considered.

47. Ms. KOSKELO (Observer for Finland) said it seemed to her that there were at least some provisions in the Model Law in which it would not be appropriate to regard branches as separate institutions - for example, the provisions regarding refunds in article 13 and those on liability and damages in

(Ms. Koskelo, Observer for Finland)

article 16. Otherwise, the result would be that liability would relate only to the assets of the branch. Clearly, it must be possible to use the assets of the whole bank to fulfil an obligation in such a case. If a general rule was introduced, it would be necessary to ensure that provisions such as those were excluded from its operation.

48. The CHAIRMAN suggested that the general provision might state that, "for the purpose of credit transfer", branches and separate offices were considered separate banks.

49. Mr. ADEDIRAN (Nigeria) said that it would be important to make clear what their situation was in relation to liability.

50. Mr. AL-NASSER (Observer for Saudi Arabia) said that the head office of a bank must act as the guarantor when questions of liability arose in relation to a branch.

51. The CHAIRMAN asked whether the Secretary could indicate which provisions of the Model Law would need to be excluded from the suggested general rule.

52. Mr. BERGSTEN (Secretary of the Commission) said he thought that the view of the Working Group had been that a provision that branches were to be treated as separate banks was needed in relation to the sphere of application of the Model Law and also in relation to operational matters. Articles 13 and 16 were different. The problem before the Commission was one of drafting as well as one of substance.

53. The CHAIRMAN suggested that the problem should be borne in mind during the discussion of the individual articles; once the substantive question was decided in each case, it would be a drafting matter to decide whether separate provisions or a general provision covering all articles would be appropriate.

54. Mr. ABASCAL ZAMORA (Mexico) thought that there might be reasons of principle against making it a general rule that branches of banks were considered to be different banks. The notion of a bank as a single legal entity should be preserved; the general rule should perhaps reflect that principle, with exceptions made where necessary.

55. The CHAIRMAN said he thought there was little difference in substance between the views expressed. The point would be considered as it arose in relation to individual articles.

The meeting rose at 5.05 p.m.